

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 August 2007

.....
IN THE MATTER OF:

C. W.

Claimant,

Case No. 2006-LDA-81

v.

MIDWEST AIR TRAFFIC
CONTROL SERVICE
Employer.
.....

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim under the Defense Base Act, 42 U.S.C. § 1651, et seq. ("DBA") an extension of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq. The DBA provides for compensation benefits for the injuries and deaths of workers employed in relation to certain government contracts outside of the United States.¹

A hearing was held in this case on November 30, 2006 in Memphis, Tennessee. Claimant and Employer, Midwest Air Traffic Control Service, Inc., were represented by counsel. Claimant offered Exhibits 1 through 4, which were admitted into evidence. Employer offered Exhibits 1 through 13, which were also admitted into evidence at the hearing. Additionally, Administrative Law Judge Exhibit 1, the pre-trial statement of the Employer reflecting the stipulations of the parties, was admitted into evidence. Both parties subsequently filed post-hearing briefs.²

STIPULATIONS

The parties have stipulated and I find that:

1. The parties are subject to the Act.

¹ 42 U.S.C. § 1651(a)(4) provides that Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, shall apply in respect to the injury or death of any employee engaged in any employment...

(4) under a contract entered into with the United States or any executive department, independent establishment, or agency thereof, . . . or any subcontract, . . . where such contract is to be performed outside the continental United States . . . for the purpose of engaging in public work.

² The following abbreviations will be used as citations to the record: "CX" for Claimant's Exhibits, "EX" for Employer's Exhibits, "ALJX" for Administrative Law Judge Exhibits, and "Tr." For Transcript.

2. Claimant and Employer were in an employee-employer relationship at the time of the injury.
3. Employer was timely notified of Claimant's injury.
4. Claimant filed a timely claim.
5. Claimant was injured at the Bagram Air Force Base in Afghanistan on March 22, 2005.
6. Claimant's disability commenced on March 22, 2005; Claimant became aware the disability was work related on March 22, 2005; and Employer had notice of the injury on March 22, 2005.
7. Claimant's injury arose out of and in the course of her employment.
8. Claimant is presently working in alternate employment, which commenced on June 16, 2006.
9. Claimant's injury resulted in a temporary total disability from April 9, 2005 to November 18, 2005.

(ALJx 1; Tr. at 8, 9.)

ISSUES

The following unresolved issues were presented by the parties:

1. Claimant's average weekly wage at the time of the alleged injury.
2. Whether Claimant's condition is permanent.
3. Whether Claimant is totally disabled.

BACKGROUND

The Claimant was born on May 26, 1955 in New Jersey. She graduated from High School in 1973. She joined the United States Navy in June of 1976 for training as an air traffic controller. Upon completing the air traffic control training program she was sent to Whiting Field in Milton, Florida for additional training. Two years later she was assigned to Operation Deep Freeze at the South Pole, where she spent three years. Claimant was one of the first five women to serve in that program and as a consequence was inducted into the National Women's Museum in Washington, DC. Subsequently, Claimant was stationed at the Glenview, Illinois Naval Air Station for three years and at Souda Bay, Greece for two or three years. After completing her tour in Greece she served in the Philippines. Her final years in the Navy were spent as an instructor at the Air Traffic Control School in Memphis and helping the Navy develop the voice-activating trainer. She retired in 1996 with twenty years of service at the rank of E-6.

After retiring from the Navy, Claimant pursued a college degree from the University of Memphis where she earned a degree in education. While attending college she worked as an air traffic controller part time and took a position at Memphis International Airport as their air traffic control trainer. For a while, Claimant was doing three jobs. She was attending college full time, working part time at Millington Municipal Airport, and working as an air traffic control trainer at Memphis International Airport.

In November, 2003, Claimant applied for and accepted a position as an air traffic controller with Employer in Afghanistan. She was deployed to an Air Force Base at Bagram, Afghanistan on December 6, 2003. She was promoted to tower chief controller on April 11, 2004. As tower chief, Claimant oversaw the all the operations of the tower. She managed 16 controllers. To work as an air traffic controller Claimant needed to maintain an FAA certification including a class II medical certificate.

Claimant's initial commitment to Afghanistan was for one year. On September 14, 2005 she signed with Employer to extend a year.

ACCIDENT

Claimant was living in a six person B-hut – a small plywood building with a divider housing six persons. At approximately 8:00 p.m. on March 22, 2005, Claimant left the living quarters of the B-hut to go to the bathroom, located outside. There were no lights on inside or outside of the B-hut or in the bathroom because of the threat of insurgents and rockets. As she went down the steps she missed one and fell onto the gravel covered ground. She twisted her body as she fell as she was holding on to the door. "I just laid there for a minute and thought I'd give everything a chance to settle before I tried to move. I realized immediately that I was hurt, but I – my arm hurt, my leg hurt, my back hurt, my neck hurt." (Tr. 36). Claimant went back to bed but the next morning was unable to move. She reported the accident the next morning to her supervisor, the air traffic manager.

Claimant was initially treated with Flexiril, as well as a pain medication, and rest by the Air Force base physician, who suspended her class II medical certificate apparently because of the pain medication. (Tr. 37). When no improvement occurred after a couple of days she was transferred to an army surgical hospital on the army side of the base. She was prescribed more pain medication and exercises. She still showed no improvement and was medevac'ed to a medical center in Landstuhl, Germany. An MRI was taken. She was subsequently sent to Memphis, Tennessee for treatment. In Memphis, Claimant was seen by Dr. Camillo, a neurosurgeon at the Campbell Clinic, an orthopedic group. He reviewed an MRI which showed no degenerative disc disease and no herniated disc. He prescribed physical therapy and Flexeril. (Ex. 7, p. 49). The prescribed physical therapy was not helping and Claimant continued to complain of pain. Dr. Camillo felt that he could not help her any further as she did not have a surgical problem. He recommended that Claimant see another doctor within his group – Dr. Rivera-Tavarez, who is Board-certified in Physical Medicine and Rehabilitation. (Ex. 7, p. 8). Dr. Camillo also remarked in his July 1, 2005 treatment report that he did not want to prescribe any pain medication. (Ex. 7, p. 47). About the same time Employer's insurance carrier referred Claimant to Dr. Bret Sokoloff for a second opinion. Dr. Sokoloff is Board-certified in

Orthopedic Surgery. (Ex. 6, 59). He prescribed a Medrol Dosepak and recommended a series of lumbar injections. (Tr. 41; Ex. 6, p. 65). Claimant returned to Dr. Rivera-Tavarez for the injections. (Tr. 42).

Dr. Rivera-Tavarez gave three injections or nerve blocks and prescribed the medication Lyrica. (Tr. 43, 44; Ex. 7, pp. 15-17). Claimant testified that the injections did not help but that the Lyrica, along with a back brace, provided "some relief." (Tr. 44). Claimant testified that the side effects she suffered from the Lyrica included an inability to stay focused on a task and blurry vision. (Tr. 48). Claimant did not get any "great" relief from pain or achieve greater mobility from Dr. Rivera-Tavarez' treatment. Dr. Rivera-Tavarez ultimately discharged Claimant, saying he had reached his limit of treatment, and recommended Claimant see a pain management specialist. (Tr. 44). Dr. Rivera-Tavarez reported that Claimant reached maximum medical improvement on November 18, 2006 with a 0% impairment rating. (Tr. 27; Ex. 7, p. 5).

Dr. Sokoloff saw Claimant a second time on December 5, 2005 through an appointment scheduled by the insurance carrier. Dr. Sokoloff felt that it was unnecessary for Claimant to see a pain management specialist. Consequently the insurance carrier did not authorize treatment by a pain specialist.

Claimant saw Dr. Rizk, whom she identified as a pain management specialist, on April 12, 2006, upon a referral from her attorney.

Claimant testified that her physical complaints have remained unchanged since she returned from Germany. (Tr. 69). She describes her pain as going across the lower back, through the left hip and down the left leg, and on a scale of 10 is usually at a five but at the end of the day is up to 8 and on some days is at 10. (Tr. 57-59).

She testified that she can not perform the physical requirements of the job of air traffic controller because she can't do the constant moving, stretching, bending and turning needed to remain in contact with aircraft in the controller's pattern. Claimant testified that at Bagram, or a busy airport, an air traffic controller can sit only about one hour during an eight hour shift. She also testified that she can not walk up the stairs to a control tower – in Bagram it was six flights of stairs. (Tr. 60-62).

Claimant was paid temporary total disability benefits from the time of the accident until November, 18, 2005, the date on which Dr. Rivera-Tavarez found that she had reached maximum medical improvement. When her disability benefits were cut off she sought information on returning to her job as an air traffic controller. (Tr. 51, 52). She testified that she was told by the claims examiner for the carrier that her disability payments were going to end, and she should contact Employer to go back to work. But when she contacted her Employer she was told that she could not return to work without the Class II certification, that the certification is a condition of employment. (Tr. 52).

Claimant testified that even if she was able to cease taking the pain medication, Lyrica, she still could not do the air traffic control position because of the physical requirements of the job.

Claimant looked for a job as an air traffic controller trainer, but was unsuccessful as only a few of those jobs exist. (Tr. 54). She testified to also looking for a job as a trainer in areas outside of air traffic control to take advantage of her degree in human development and learning, but she was unsuccessful. (Tr. 54). She worked for six weeks as a management trainee for a pawn shop at a salary of \$34,000 a year, but lost the job because she was told that she “wasn’t going to fit into their program.” (Tr. 54). She then secured a part time job with Home Depot as a customer service representative, 32 hours per week at \$9.00 per hour. (Tr. 55). Claimant testified that she is able to do the job at Home Depot because she does not have to stand all day. She can alternately sit and stand as her back condition allows. At the end of her eight hour shift she goes immediately to bed, as she is tired from standing. (Tr. 56, 57).

Claimant’s job as tower chief controller involves about 50% to 75% administrative work. A chief tower controller must maintain proficiency by working at least 16 hours a month in the tower. (Tr. 79).

Claimant’s salary when she retired from the Navy was about \$28,000. (Tr. 63). Her salary when she worked as an air traffic control trainer, the last job she held before she started with Midwest was about \$56,000 a year. (Tr. 63). Claimant’s wage when she started with Midwest was \$125,000 per year. When she received her promotion to tower chief her income increased to \$144, 000 per year. (Tr. 63).

MEDICAL REPORTS

Dr. Carlos E. Rivera-Tavarez

Dr. Carlos E. Rivera-Tavarez is Board Certified in Physical Medicine and Rehabilitation. (Ex. 7, p. 33).³ He practices at Campbell Clinic in Memphis, Tennessee. Dr. Rivera-Tavarez testified that Claimant was referred to him by Dr. Francis X. Camillo because Dr. Camillo, a surgeon, did not diagnose a condition requiring surgical treatment. (Ex. 7, p. 8). Dr. Rivera-Tavarez first saw the Claimant on August 17, 2005. His examination revealed a gait slightly antalgic to the left, lumbar range of motion causing complaints of pain during flexion, slump test positive for pain on back and left buttock and Patrick’s test causing complaints of some pain on left buttock and low back area. He reviewed an MRI of the lumbar spine that was performed on April 5, 2005 revealing degenerative changes mostly at L3-4 and L4-5. Dr. Rivera-Tavarez’ Impression was: 1) Lumbar Degenerative Disc Disease; and 2) Symptoms suggestive of lumbar radiculitis, mostly at L5, possible less likely sacroiliac joint pain. (Ex. 7, p. 45).

Dr. Rivera-Tavarez performed L5 and S1 epidural injections. They did not help relieve the pain. He subsequently performed a left S1 joint injection but it did not provide any relief. (Ex. 7; p. 15, 16). Dr. Rivera-Tavarez reported after a November 18, 2005 appointment that:

We do have a Functional Capacity Evaluation. The Functional Capacity Evaluation shows that she has the capacity to sit frequently and walk frequently, something that will allow her to work with her regular work. She has persisted with pain but we have not been able to help her. Based on this, she has reached

³ Employer’s Exhibit 7 is Deposition of Dr. Carlos E. Rivera-Tavarez.

maximal medical improvement. I think she has a permanent impairment of 3% based on the constant symptoms, reticular in nature with no objective areas of injury. Based on the Functional Capacity Evaluation, I think she could be able to return to her regular duty without any restriction. (Ex. 7; p. 41).

Dr. Rivera-Tavarez also stated in his report that he would like for Claimant to have one consultation with Drs. Mays or Schnapp, chronic pain management specialists, to see if there was something they could do. (Ex. 7, pp. 26, 41).

Claimant's last appointment with Dr. Rivera-Tavarez was on February 24, 2006. The report of this examination states that Claimant requested the appointment to get a refill on the medication, Lyrica. The report also states that Claimant reached maximum medical improvement with a 3% permanent disability. Dr. Rivera-Tavarez testified that Complainant requested hydrocodone, a narcotic medication. She told Dr. Rivera-Tavarez that she was given the hydrocodone after surgery and it completely resolved the pain. Dr. Rivera-Tavarez denied her request for a prescription for the hydrocodone, explaining that she would have to see her family doctor or pain specialist. (Ex. 7, pp. 22, 23, 40).

Dr. Rivera-Tavarez subsequently changed his finding of a 3% permanent disability to a 0% impairment rating after he was contacted by the Employer's vocational rehab nurse. Dr. Rivera-Tavarez testified that he changed the rating because when questioned on the source of the pain, he was not able to provide any specific objective evidence. (Ex. 7, pp. 21, 22, 28, 88).

Dr. Bret Sokoloff

Dr. Bret Sokoloff is Board Certified in orthopedic surgery. (Ex. 6, p. 59).⁴ Dr. Sokoloff saw the Claimant for purposes of an independent medical evaluation at the request of the Employer. He first saw the Claimant on August 5, 2005. Claimant reported symptoms of low back pain greater on left side than right, radiating to toes on left side; hip and thigh pain worse than leg symptoms. She also reported decreased sensation on left side with prolonged sitting. Dr. Sokoloff noted that Claimant took Tylenol as well as Neurontin, which gave her good relief, but makes her non-functional, and Ultram for pain. Dr. Sokoloff's assessment was degenerative lumbar spine and sciatica. As a plan to help Claimant Dr. Sokoloff recommended lumbar injections, Medrol Dosebak to help radicular symptoms, home exercises, and temporary restrictions of no repetitive bending, no lifting more than 35 pounds and no prolonged sitting or standing. Dr. Sokoloff's prognosis was that the Claimant should be able to return to her regular job duties within a reasonable amount of time, assuming the lumbar injections provide good relief, as he expected. Dr. Sokoloff testified by deposition that the degenerative lumbar spine was caused by arthritis and pre-existed the March 2005 accident, and that he diagnosed sciatica from the Claimant's description of pain back going down the leg, even though she had no objective findings indicating sciatica. (Ex. 6, p.10). Dr. Sokoloff explained that Ultram is a non-narcotic pain medication and Neurontin is a nerve medication used by neurologists to decrease pain sensation from nerve injuries. (Ex. 6, pp. 8, 9). Dr. Sokoloff testified that he found no signs of major trauma or major impairment. (Ex. 6, p. 12).

⁴ Employer's Exhibit 6 is Deposition of Dr. Bret Sokoloff, October 6, 2006.

Dr. Sokoloff saw the Claimant a second time on December 10, 2005 after she had undergone a series of nerve blocks and an SI joint injection by Dr. Rizk. She had also undergone a functional capabilities evaluation which showed an ability to sit for 45 minutes, walk on treadmill for 18 minutes and sit for an additional 49 minutes. Her pain scales were considered to be extremely high and to not correlate with any objective findings. Dr. Sokoloff testified that there were no objective findings of significant pathology, but rather there were signs of symptom magnification in that her objective findings weren't consistent with how she performed on physical tests, there was no tenderness about the sacroiliac region or lumbar spine and no pain going down leg on examination. (Ex. 6, p. 18). Dr. Sokoloff also reported difficulty in assessing Claimant's motor skills as she "gives way" as opposed to actively resisting to best of ability. (Ex. 6, p. 19). Dr. Sokoloff offered the opinion that Claimant could work with the ability to change position every two hours, no repetitive bending and no lifting more than 36 pounds. Dr. Sokoloff recommended repeating the MRI for further evaluation, and offered the opinion that if the MRI showed only the degenerative changes and no impingement on the nerve roots or spinal cord, he would consider her at maximum medical improvement without residual impairment and without any work restrictions. Dr. Sokoloff did not believe that the Claimant required pain management treatment. (Ex. 6, pp. 18, 19, 67).

Dr. Sokoloff saw Claimant on December 19, 2005 to review the MRI results. The MRI revealed an L4 annular tear in addition to moderate degenerative disc disease caused by arthritis and pre-existing the March 2005 accident. He also testified that the L4 annular tear could not cause numbness or any pain down the leg. (Ex. 6, pp. 10, 37, 69). Dr. Sokoloff found the Claimant to be at maximum medical improvement without any residual impairment. He again reported no objective findings, only symptoms of subjective pain, and offered that the workers compensation issue could be closed. (Ex. 6, p. 69). He testified that the results of the testing was negative, in that she had good motion and mobility, no gait issues, was able to get up and down from chair and table without problems, and there were no findings of any radicular problems. (Ex. 6, p. 23).

Dr. Sokoloff's report noted that Claimant was taking the medication Lortab, a narcotic. He testified that he disagreed with her taking the Lortab as he was of the opinion that the only medication she could potentially need was an anti-inflammatory. (Ex. 6, p. 22). He also reported that Claimant did not improve with the injections, which typically provide excellent relief to people who have arthritic findings.

Dr. Sokoloff's final evaluation of Claimant was on August 30, 2006. He found Claimant's complaints to be unchanged. His report states that Claimant takes the medication Lyrica, but gets minimal relief, and quotes Claimant as characterizing the symptoms throughout the day as 6-8 out of 10, and at the end of the day as 10 out of 10. Dr. Sokoloff notes that Claimant was seen by Dr. Rizk who diagnosed an SI dysfunction and radiculopathy and gave a 10% impairment of the whole person as well as placing limitations on her movement. Dr. Sokoloff disagrees with Dr. Rizk, asserting that no justification exists for his impairment rating or the restrictions. (Ex. 6, p. 71, 72). He explains that the SI dysfunction that Dr. Rizk describes is not supported by his examination, that Dr. Rizk has not performed any testing to support same, and that Dr. Rizk's diagnosis of radiculopathy is contradicted by studies showing

no evidence of radiculopathy. Dr. Sokoloff concludes that Claimant is “very capable of working in any capacity without any restrictions.” (Ex. 6, p. 72).

Dr. Sokoloff also criticizes Claimant’s taking the medication Lyrica because the medication is not prescribed or approved for any condition she has. He explained its purpose is to decrease painful nerve impulses, and moreover, it is not helpful to her as it only provides minimal relief. (Ex. 6, p. 26).

Dr. Tewfik Rizk

Dr. Rizk is Board Certified in Physical Medicine. (Cx. 1, p. 26).⁵ He evaluated Claimant’s condition at the request of Claimant’s counsel. He saw the Claimant three times and examined her on two of the occasions. Dr. Rizk’s diagnosis was left sacroiliac joint dysfunction with radiculopathy related to her injury of March 21, 2005. He assigned a 10% permanent disability, and he recommended avoiding employment necessitating repetitive lumbar spinal movement, mainly bending and twisting at the same time. He also recommended that Claimant avoid lifting, pushing or pulling more than twenty-five pounds. (Cx. 1, ex. 2). Dr. Rizk testified that he did not know whether Claimant could perform her last job as an air traffic controller. (Cx. 1, p. 31).

Claimant told Dr. Rizk during her visit on May 22, 2006 that the Lyrica was helping her to alleviate the pain going down her leg but that her back pain was still the same. Dr. Rizk also quoted her as saying that “she is unable to work as a traffic controller now simply because [of] the medication which is prohibited by federal law.” (Cx. 1, ex. 2). Dr. Rizk’s plan on this visit was to try an iliosacral support for a couple of weeks and to continue her medication. Claimant next visited Dr. Rizk on September 13, 2006 complaining of pain and complaining that the brace was not helping. Dr. Rizk discovered that Claimant was using the incorrect brace. (Cx. 1, ex. 2).

Dr. Rizk testified that his diagnosis of sacroiliac dysfunction was based on Claimant’s complaint of pain, review of medical records showing she was diagnosed with the same by other physicians and positive maneuvers on clinical examination. (Cx. 1, p. 29) The medical records referenced by Dr. Rizk as supporting his diagnosis were the July 1, 2005 and August 17, 2005 reports from Campbell Clinic. (Cx. 1, p. 13). The reference on the July 1, 2005 report was to a positive Faber test on the left leg and the August 17, 2005 reference was to Dr. Rivera-Tavarez’ impression of “symptoms suggestive of lumbar radiculitis, mostly at L5, possibly less likely sacroiliac pain.” (Ex. 7, pp. 45, 47). However, Dr. Rivera-Tavarez testified that his evaluation and treatment of Claimant at Campbell Clinic resulted in him not being able to find a source of Claimant’s pain. (Ex. 7, p. 15). Thus, the Claimant’s medical records referenced by Dr. Rizk do not support a finding of a sacroiliac dysfunction.

Dr. Gerald Bock

Dr. Gerald Bock is board certified in Family Practice Medicine. (Ex. 8, pp. 5,6).⁶ His practice is called Aviation Medical Specialist. He primarily performs physicals and handles

⁵ Claimant’s Exhibit 1 is Deposition of Dr. Tewfik Rizk, September 28, 2006.

⁶ Employer’s Exhibit 6 is Deposition of Dr. Gerald Bock, July 5, 2006.

cases involving commercial pilots who have drug and alcohol problems under the auspices of an FAA-approved program called Human Interventional Motivational Studies intended to get such commercial pilots back to flying. (Ex. 8, p. 7).

Dr. Bock addressed a letter to “To Whom It May Concern” stating that he talked with Claimant and she is still on pain medication after an injury, and the FAA does not allow anyone to return to work while taking mood alteration medicines. His letter continued that, “[a]s long as she is on the pain medication she will not be able to perform her duties as an air traffic controller.” Dr. Bock testified that he never met the Claimant, has never evaluated Claimant, and has no knowledge of her physical condition or the need for her to take a medication. He would defer to her treating physician with respect to her condition and ability to return to work. (Ex. 8, pp 13, 14).

VOCATIONAL REPORTS

David Stewart

David Stewart is a Rehabilitation Counselor. He offered a vocational evaluation of Claimant. He reviewed medical records from Dr. Rizk; deposition of Dr. Rizk; deposition of Dr. Rivera-Tavarez; work history; and vocational testing, including the Wide-Range Achievement Test and the Shipley Institute of living scale which gives a gross measure of intellectual functioning. (Cx. 4, Tr. 93). He accepted that Claimant has the physical limitations recommended by Dr. Rizk, and he assumed that Claimant was unable to perform the job as an air traffic controller because she was taking pain medication. (Tr. 98). Stewart determined that Claimant was limited to sedentary work as a result of Dr. Rizk’s limitation. (Tr. 100).

Stewart found that Claimant is a college graduate with significant intellectual capabilities and has demonstrated tremendous work skills through her work life. (Tr. 113). He accepted without explanation the diagnosis by Dr. Rizk imposing restrictions limiting the Claimant to sedentary work over the report of Dr. Rivera-Tavarez finding 0% limitations. (Tr. 124).

David R. Strauser

David Strauser is a vocational rehabilitation consultant. (Ex. 10). He evaluated Claimant’s future vocational functioning. He reviewed medical records, work history and administered vocational testing. He presented two scenarios of Claimant’s future earning capacity depending on which medical opinion of Claimant’s physical capabilities would be accepted. If the reports and conclusions of Dr. Rivera-Tavarez and Dr. Sokoloff were accepted, Strauser’s report would find that Claimant is able to return to her position as an air traffic controller in Afghanistan without any vocational impairment or vocational loss of earning capacity. If Strauser applied the restrictions offered by Dr. Rizk and assumed Claimant needed to take prescription pain medication, he would find a significant vocational impairment and loss of earning capacity. (Ex. 9).

Jim Wagner

Jim Wagner has 28 years experience as an air traffic controller, including eight years experience with the Air Force, ten years experience with the FAA and ten years contract experience. He worked as an air traffic controller at Bagram Air Force Base. (Cx. 2, p. 3, 4).⁷ He testified that typically, an air traffic controller would sit no more than one hour during the course of an eight hour shift, and the hour when seated would not be continuous. (Cx. 2, p. 9). He also testified that towers are a minimum of two stories high and that access to most towers is by stairs as only a few at large airports have elevators. He described the access to the Bagram tower as by ladder almost straight up. (Cx. 2, p. 12). He described a controller's movement as having to continually bend, stoop, twist and move with sudden stopping and twisting, as well as requiring simultaneous repetitive bending and twisting, so as to locate aircraft. (Cx. 2, pp. 14, 16). Wagner testified that a controller must be very attentive and constantly alert for the entire eight hours. (Cx. 2, p. 16).

All controllers are required to take a Class II medical examination by an FAA certified surgeon every year. Controllers are not permitted to work while taking medication such as pain killers that would be impairing. (Cx. 2, p. 17). Wagner testified that a tower supervisor's duties are about 75% administrative and 25% controller. (Cx. 2, p. 25).

Shane Cordes

Shane Cordes is the President and CEO of the Employer. He is a licensed air traffic controller. He held proficiency as a controller for about 15 years. (Ex. 11, p. 5, 6).⁸ He testified that the air traffic controller position is not "very physically challenging," that the work is mostly done while seated, although there is some turning the body to look out the window. "...they would probably scan the runway to ensure that there are no aircraft on the runway, if they're clearing someone for departure or to land. They may have to look out...at any particular direction...If it's a radar environment, they don't have to do all this. It's really not strenuous..." (Ex. 11, p. 9). Cordes testified that the only "litmus test" is whether one can pass the annual physical which he described as not very robust. (Ex. 11, p. 7, 8). Cordes considered testimony that an air traffic controller is required to twist and bend simultaneously in order to track aircraft as "dramatizing" the position. (Ex. 11, p. 9). Cordes testified that duties of an air traffic control supervisor are primarily administrative. He agrees with the estimate of 70% of supervisor's time being spent doing purely administrative duties. (Ex. 11, p. 11). Cordes knows of no reason why Claimant would not be eligible for a Class II license other than taking the prescription medicine. (Ex. 11, p. 12).

Cordes testified that Employer was fully anticipating that Claimant would return to her position with the company. (Ex. 11; p. 13).

The Employer has about 100 facilities worldwide, and numerous positions exist, international and domestic, for a person of Claimant's qualifications. (Ex. 11, p. 21). Cordes

⁷ Claimant's Exhibit 2 is Deposition of James D. Wagner, September 6, 2006.

⁸ Employer's Exhibit 11 is Deposition of Shane L. Cordes, November 29, 2006.

testified that persons with air traffic control training are in demand, including sales and management positions. (Ex. 11; pp. 22, 23).

TOTAL DISABILITY

Claimant contends that she is totally disabled as a result of her fall on March 22, 2005 at the Bagram Air Force Base in Afghanistan. Total disability is defined as the complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. The employee has the initial burden of proving total disability. To establish a prima facie case of total disability, the Claimant must show that she can not return to her regular or usual employment due to work related injury. At this initial stage Claimant is not required to establish that she cannot return to any employment. She is only required to show that she cannot return to her former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984).

Claimant contends that she is unable to return to her job as an air traffic controller because of the physical requirements of the job such as a constant moving, turning and bending to locate and visually sight aircraft descending into the airspace and pattern, (Tr. 60-62) and because she takes the prescription medication, Lyrica, the taking of which precludes one from working as an air traffic controller. (Tr. 37, 47; Ex 8, p. 19).

Claimant testified that since her fall she has suffered from significant pain across her lower back, through the left hip and down her left leg. (Tr. 43, 69). She testified that while taking the Lyrica her pain level is at 5 out of 10 most of the time but increases to an 8 by the end of the day, although on some days it is at a 10. (Tr. 69).

In support of her claim Claimant offers the reports and depositions of Drs Rivera-Tavarez and Dr. Rizk.

Dr. Rivera-Tavarez saw Claimant for treatment on a referral from Dr. Francis X. Camillo. Dr. Camillo is a spine surgeon and he found no surgical resolution for her problems. (Tr. 8). Dr. Rivera-Tavarez saw the Claimant from August 17, 2005 to her last appointment on February 24, 2006 but he was unable to locate a cause of the Claimant's pain. (Tr. 14). "We didn't have a source, a specific source of pain." (Tr. 15). Consequently, Dr. Rivera-Tavarez recommended epidural injections. (Tr. 15). The initial injection, a selective nerve block, was done on August 18, 2005. It did not afford any relief. (Tr. 16). A second epidural, a selective nerve block at two levels, was done on September 29, 2005. According to Claimant, it did not relieve the pain. A third injection, an SI joint injection, was given on November 8, 2005. (Tr. 18). In his report on the November 18, 2005 visit, Dr. Rivera-Tavarez mentioned that he tried the medications Neurontin, Lyrica, and anti-inflammatory medications, but none helped except Lyrica. He reported that Claimant felt Lyrica "shows very mild decrease in the burning but is still there all the time." Dr. Rivera-Tavarez also had a functional capacity evaluation performed. The evaluation demonstrated to Dr. Rivera-Tavarez that Claimant has the capacity to do her regular work. Dr. Rivera-Tavarez concluded that the Claimant had reached maximal medical improvement in as much as she did not respond to any of his treatments. Dr. Rivera-Tavarez assessed a permanent impairment of 3% based on symptoms of pain with no objective areas of

injury. He concluded that Claimant was able to return to her regular duty without any restriction. (Ex. 7, pp. 19, 20, 21, 41).

Dr. Rivera-Tavarez subsequently changed his impairment rating to a 0% impairment because, when questioned by Employer's vocational rehab nurse, he was not able to provide any specific objective evidence of injury. (Ex. 7, pp. 21, 22, 28, 88).

Claimant's burden to show that she is totally disabled is not helped by the opinion of Dr. Rivera-Tavarez as he concludes that Claimant is able to return to regular duty without any restrictions.

Dr. Rizk evaluated Claimant's condition at the request of Claimant's counsel. Dr. Rizk assigned a 10% permanent disability due to a left sacroiliac joint dysfunction with radiculopathy related to her injury of March 21, 2005. He recommended avoiding any type of employment necessitating repetitive lumbar spinal movement, and to avoid lifting, pushing or pulling more than twenty-five pounds. Dr. Rizk testified that his diagnosis of sacroiliac dysfunction is based on Claimant's complaint of pain, review of medical records showing she was diagnosed with the same by other physicians and positive maneuvers on clinical examination. (Cx. 1, p. 29). The medical records referenced by Rizk were the July 1, 2005 and August 17, 2005 reports from Campbell Clinic. (Cx. 1, p. 13). The reference on the July 1, 2005 report was to a positive Faber test on the left leg and the August 17, 2005 reference was to Dr. Rivera-Tavarez' impression of "symptoms suggestive of lumbar radiculitis, mostly at L5, possibly less likely sacroiliac pain." (Ex. 7, pp. 45, 47). However, Dr. Rivera-Tavarez subsequently concluded and testified that his evaluation and treatment of Claimant at Campbell Clinic resulted in him not being able to find a source of Claimant's pain. (Cx. 1, p. 15). Thus, Dr. Rivera-Tavarez' medical records do not support a finding of a sacroiliac dysfunction. Dr. Rizk's diagnosis of sacroiliac dysfunction is supported only by Claimant's subjective complaints of pain.

Claimant told Dr. Rizk that the Lyrica is helping to alleviate the pain going down to her leg but that her back pain is still the same. Dr. Rizk also quoted her as saying that "she is unable to work as a traffic controller now simply because [of] the medication which is prohibited by federal law." Dr. Rizk's plan for Claimant was to use an iliosacral support for a couple of weeks and to continue the medication, apparently the Lyrica.

Employer offers the report of Dr. Bret Sokoloff who saw the Claimant for purposes of an independent medical evaluation at the request of the Employer. Dr. Sokoloff first saw the Claimant on August 5, 2005. Claimant reported symptoms of low back pain greater on left side than right, radiating to toes on left side with hip and thigh pain worse than leg symptoms. She also reported decreased sensation on left side with prolonged sitting. Dr. Sokoloff noted that Claimant took the medications Tylenol and Neurontin which gave her good relief, but made her non-functional, and Ultram for pain. Dr. Sokoloff's assessment was degenerative lumbar spine and sciatica. As a plan to help the Claimant Dr. Sokoloff recommended lumbar injections, Medrol Dosebak to help radicular symptoms, home exercises, and temporary restrictions of no repetitive bending, no lifting more than 35 pounds and no prolonged sitting or standing. Dr. Sokoloff found no significant trauma or major impairment and his prognosis was that the Claimant should be able to return to her regular job duties within a reasonable amount of time,

assuming the lumbar injections give her good relief, as he expected. Dr. Sokoloff explained that Ultram is a non-narcotic pain medication and Neurontin is a nerve medication used by neurologists to decrease pain sensation from nerve injuries. (Ex. 6, p. 8, 9).

Dr. Sokoloff saw the Claimant a second time on December 19, 2005 after she had undergone a series of nerve blocks, an SI joint injection by Dr. R and a functional capabilities evaluation. Her pain scales were considered to be extremely high and to not correlate with any objective findings. Dr. Sokoloff found no objective indication of significant pathology, but rather he saw signs of symptom magnification as he felt that her objective findings weren't consistent with how she performed on physical tests, there was an absence of tenderness about the sacroiliac region or lumbar spine and he found no pain going down her leg on examination.

Dr. Sokoloff concluded that the Claimant was at maximum medical improvement without any residual impairment. He reported no objective findings as the results of the testing was negative, she had good motion and mobility, no gait issues, was able to get up and down from chair and table without problems, and no radicular problems.

Dr. Sokoloff's final evaluation of Claimant was on August 30, 2006. He found Claimant's complaints to be unchanged but concluded that Claimant is "very capable of working in any capacity without any restrictions." (Ex. 6, p. 72). Dr. Sokoloff disagreed with Dr. Rizk's diagnosis of an SI dysfunction and radiculopathy and a 10% impairment with limitations on her movement. Dr. Sokoloff asserted that no justification exists for the impairment rating or the restrictions. He explained that the SI dysfunction that Dr. Rizk described is not supported by his examination and Dr. Rizk has not performed any testing to support same, and that Dr. Rizk's diagnosis of radiculopathy is contradicted by studies showing no evidence of radiculopathy. Dr. Sokoloff also reasoned that Claimant's description of pain was not localized to the SI joint.

The weight of the evidence shows that Claimant is able to return to her job from a physical standpoint with no restriction. Drs. Rivera-Tavarez and Sokoloff concluded that their evaluations showed no impairment. Dr. Rizk found a 10% impairment based on a sacroiliac dysfunction with radiculopathy. But, as previously explained, the sole support for his finding was Claimant's subjective complaints of pain. Even so, Dr. Rizk could not offer an opinion that Claimant could not perform her last job as an air traffic controller. His concern was whether she could perform the job while on narcotics or any medication which would result in dizziness or confusion. (Cx.1, p. 31).

The issue remaining is whether Claimant should be found to be disabled because she is must take Lyrica to control pain. Even though Dr. Rivera-Tavarez finds that Claimant has the capacity to do her regular work and is able to return to regular duty without any restrictions, he has prescribed Lyrica. It is undisputed that Claimant can not be issued a Class II medical certificate while she is taking Lyrica. Initially, it has been held that creditable complaints of pain alone may be enough to meet the burden of establishing total disability. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). However, there must be some basis for a finding of the existence of pain. See *Sylvester v. Director, OWCP and Bethlehem Steel Corp.*, 681 F.2d 359 (5th Cir. 1982) where the Court sustained a decision of the Benefits Review Board vacating an Administrative Law Judge's finding of permanent partial disability because the sole medical

testimony favorable to the claim was conditioned on subjective complaints. Neither Dr. Rivera-Tavarez nor Sokoloff could find a cause for the pain of which Claimant complained. Dr. Rivera-Tavarez' initial finding of a 3% impairment was based on subjective symptoms of pain. (Ex. 7, p. 21). Thus, his subsequent opinion of 0% impairment presumes he either no longer considered pain to exist or he did not consider it an impediment to employment. Dr. Sokoloff characterized Claimant's symptoms of pain as "symptom magnification" which he explained as meaning that her objective findings weren't consistent with how she performed on the physical tests. Dr. Rizk testified that Claimant's pain is caused by a sacroiliac dysfunction with radiculopathy. In fact, Dr. Rizk characterizes the sacroiliac dysfunction as a "real bad one" in light of Claimant's symptoms. However, for reasons previously explained, that diagnosis is inconsistent with the medical reports on which he relied for the diagnosis. (Ex. 7, p. 14). Thus Claimant has not met her burden of showing that she is totally disabled from performing her last job because of symptoms of pain. Further, if Claimant has not shown that she is disabled because of symptoms of pain, it follows that she has not shown that she is disabled from performing her last job because of having to take Lyrica for the pain. Dr. Sokoloff testified that Claimant should not be taking Lyrica. He testified that it is not appropriate because it is not prescribed for the indications in this case and it is not appropriate because it is not helpful to her. Its purposes are to help decrease painful nerve impulse as a result of diabetic nerve pain, pain after shingles and partial onset seizures, none of which Claimant has. (Ex. 7, p. 26). Dr. Sokoloff also noted that in light of Claimant's description of her symptoms, it is not working to any significant degree. He referenced his treatment records from August 30, 2006 where Claimant informed him that her pain was 6 to 8 out of 10 throughout the day, and by the end of the day was 10 out of 10. (Ex. 7, pp. 6, 72). Dr. Sokoloff also was critical of Claimant's report that he was taking Lortab, a narcotic medication, for pain. Dr. Sokoloff explained that the only medication Claimant potentially needs is an anti-inflammatory. (Ex. 7, p. 22). Dr. Rivera-Tavarez' treatment records on February 24, 2006 document that Claimant requested from Dr. Rivera-Tavarez a prescription for the narcotic, hydrocodone, for her pain. She told Dr. Rivera-Tavarez she was given a prescription for the medication after surgery, and it completely resolved her back pain. (Ex. 7, p. 40). Dr. Rivera-Tavarez refused to give her a prescription. He testified that it was not necessary for her to take a narcotic medication. (Ex. 7, p. 23).

Accordingly, it is determined that the Claimant has not met her burden of showing that she can not return to her job as a air traffic controller as the medical evidence, taken as a whole, does not support any restrictions on her ability to do that job and the medical evidence does not support a need to take the pain medication which precludes her from qualifying for the Class II license, and consequently the air traffic control position.

Shane Cordes, the President and CEO of Employer, testified that Claimant could return to her job as a control tower supervisor. "In fact, we were fully anticipating that she would return." (Ex. 11, p. 13). He also testified that Employer services some 100 facilities world wide at about 95 airports, and that numerous opportunities exist both domestic and overseas with someone of Claimant's training and experience. (Ex. 11, pp. 20, 21).

Since Claimant is not disabled from returning to her prior job as an air traffic control supervisor or as an air traffic controller, and opportunities for employment at those positions exist, Claimant has not shown that she has suffered a loss of wage earning capacity from the

March 22, 2005 accident since reaching maximum medical improvement on November 18, 2005, and her request for benefits under the Act because of a loss of wage earning capacity is denied.

ORDER

In consideration of the aforesaid, it is hereby ORDERED:

1. Claimant's request for temporary total disability benefits from November 18, 2005 to June 16, 2006 is denied; and
2. Claimant's request for permanent disability benefits commencing on June 16, 2006 is denied.

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THOMAS M. BURKE
Administrative Law Judge